LAM KONG CO. LTD.

v.

THONG GUAN CO PTE. LTD.

SUPREME COURT, JOHOR BAHRU
ABDUL HAMID OMAR CJ (MALAYA)
WAN SULEIMAN SCJ
GEORGE SEAH SCJ
[CIVIL APPEAL NO. 186 OF 1984]
10 MAY 1985

CIVIL PROCEDURE: *Claim for specific performance - Writ indorsed and served - No appearance by appellants - Whether judgment in default could be entered.*

In an action of specific performance for the delivery by the appellants of all the issue documents of title to some building lots, the respondents obtained judgment in default when the appellants failed to appear to the writ of summons which was specially indorsed for specific performance. The appellants appeal to set aside the judgment on the ground that it was wrongly entered into as the judgment sought was in respect of a claim of specific performance and that the respondents should have proceeded with the action as though the appellants had appeared.

Held:

[1] In view of r. 12 of O. 13, the respondents ought to have been precluded from entering default judgment against the appellants.

[2] In this case where the writ filed by the respondents was a specially indorsed writ for specific performance and the respondents had not abandoned the relief sought, the respondents are to proceed with the action as though the appellants had appeared.

[Appeal allowed. Judgment in default set aside. Costs to appellants. Deposit refunded to appellants.]

Case referred to:
Re Harrison's Share Under A Settlement [1954] 2 All ER 453

Legislation referred to:
Rules of the Supreme Court 1957, O. 3 r. 6, O. 13 r. 12, O. 14A, O. 27 r. 11, O.70 r.2
Rules of the Supreme Court 1965 [UK], O. 13 r. 6

Other source referred to:
Supreme Court Practice [1979] (White Book) Vol. 1 p. 125

For the appellants - Upali Masacorale (Lim Cheun Ren with him); M/s. Lim & Teng
For the respondents - Gan Kim Sing; M/s. Gan & Lim

JUDGMENT

Abdul Hamid Omar CJ (Malaya):

This is an appeal against the decision of Mohamed Yusof J in the High Court, Johor Bahru dismissing an application to set aside the judgment in default of appearance entered against the appellants on 14 January 1980.

Judgment in default was entered in respect of a claim by the respondent, Thong Guan Company (Pte.) Limited:

(a) for the delivery by the appellants all the issue documents of title to the said 26 building lots. Lots 260 to 265; 269 to 283 and 296 to 300 known as Lam Kong Estate, Jalan Pandan, Johore Bahru, being part of land comprised in Johore Malay Lease No. 73 Lot 142 as described above (now knows as Lots 2505; 2461 to 2465; 2490 to 2495; 2497 to 2502; 2506 to 2513, in the Mukim of Tebrau, District of Johore Bahru).

(b) to execute and deliver 26 valid and registrable transfers of the said 26 building lots in favour of the plaintiffs so as to enable the plaintiffs to complete the transfers and to submit building plans and to erect the buildings on the said lots.

The service of the writ was effected by the Process Server of the Supreme Court, Singapore by leaving a copy of the same at the place No. 256, Middle Road, Singapore purportedly the registered office of the appellants. Order for service out of jurisdiction was obtained on 19 September 1979 and judgment in default was entered on the date mentioned above by the Senior Assistant Registrar, High Court, Johor Bahru, the appellants not having appeared to the Writ of Summons.

It is the appellants' contention the judgment in default was entered wrongly as

(a) there was no proper service on the company; and

(b) the judgment sought for was in respect of a claim for specific performance.

For purpose of this appeal suffice if we deal only with the second issue which is the central issue in this appeal. The question is whether a judgment in default could be entered against the appellants in respect of a claim for specific performance. The relevant rules applicable at the material time were the Rules of the Supreme Court, 1957 (RSC 1957). O. 13 r. 12 of the RSC 1957 provides that:

> In all actions not by the rules of this Order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, and if the writ is not specially indorsed under O. 3, r. 6, of a statement of claim, the action may proceed as if such party had appeared, subject, as to actions where an account is claimed, to the provisions of O. 15.

In the light of r. 12 O. 13 it seems clear that if the writ is specially indorsed, which it is in this case, (see O. 3 r. 6) then the plaintiffs are to proceed with the action as if the defendants had appeared. O. 13 r. 12 of the RSC 1957 is substantially similar to O. 13 r. 6 of the Rules of the Supreme Court, 1965 (English Rules) the effect of which is stated in the *Supreme Court Practice* 1979 (White Book) Vol. 1 at p. 125 as follows:

> The effect of para. (1) of r. 6 is to preclude a plaintiff from entering judgment in default of appearance in every case in which the indorsement on the writ contains or includes a claim which is not squarely within rr. 1 to 4 of this Order, and to require him to proceed with the action as if that defendant had appeared. If, therefore, there is indorsed on the writ a claim for an account, injunction, specific performance, declaration or rectification or other remedy or relief which falls outside the descriptions specified in rr. 1 - 4, the plaintiff cannot enter judgment in default of appearance, unless he expressly and finally abandons every such remedy or relief.

The instant case seems to come squarely within the ambit of O. 13 r. 12 of the RSC 1957 as clearly the writ filed by the respondents was a specially indorsed writ for specific performance and the respondents had not abandoned the relief sought. O. 13 r. 12 is explicit in that in such a case the plaintiffs are to proceed with the action as though the defendants had appeared. In view of r. 12, therefore, the respondents ought to have been precluded from entering default judgment against the appellants. The next step for the respondents to do

indeed what the respondents ought to have done would have been to set down the action on motion for judgment. At the hearing of the motion the Court would have to consider judgment as upon the statement of claim the Court or the Judge should consider the plaintiff to be entitled. (See O. 27 r. 11 of the RSC 1957).

In this regard it is significant to note that there are specific provisions in the RSC 1957 under O. 14A dealing with summary judgment in actions for specific performance. Order 14A reads:

> In any action commenced by writ of summons indorsed with a claim for specific performance of an agreement, whether in writing or not, for the sale or purchase of property, with or without alternative claims for damages, ... the plaintiff may (whether the defendant has appeared or not), on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and stating that in his belief there is no defence to the action, apply to the Court or a Judge for judgment and the Court or Judge may thereupon give judgment in the action unless the defendant by affidavit, or by his own *viva voce* evidence or otherwise, satisfies the Court or Judge that he has a good defence to the action on the merits, or discloses facts sufficient, in the opinion of the Court or Judge, to entitle him to defend.

Counsel for the appellants submitted that the non-compliance in the instant case constituted a fundamental defect and not a mere irregularity. And that being so the defect was not curable. Counsel for the respondents, however, argued that in the light of O. 70, which was in force at the relevant time, the non-compliance with any of the rules ought not to have rendered the proceedings void unless the Court or a Judge had otherwise directed. Rule 70 of the RSC 1957 applied only to cases in which there was non-compliance of any provision of these rules or other rules of practice. In this regard a distinction has to be drawn between an irregularity and a nullity. It is not important to-day as the distinction is now discarded under the new Rules of the High Court. For this reason we consider the effect of such non - compliance only for purposes of this appeal.

It is to be observed that the effect of the rule was to disentitle the respondents from entering default judgment on a writ specially indorsed for specific performance. They were to proceed in the manner provided by the Rules and that was to set down the action on motion for judgment. It was only on the further step being taken that it was open for the Court or Judge to consider giving judgment as upon the claim the Court or Judge should consider the respondents to be entitled. At that point of time therefore judgment in default was not only given in breach of r. 12 but had resulted in a failure to comply with r. 11 of O. 27. In the circumstances we are constrained to hold that the breach and the non-compliance were not merely irregularities but fundamental defects. The fundamental defect was not, in our view, curable as the effect of the breach and non-compliance was to defeat the right of the other party to the action.

It was provided under O. 70 r. 2 that:

> An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

As can be seen, there was no unreasonable delay. The appellants clearly took step to apply to set aside the judgment in default as soon as they became aware of it. For this reason, we form the view that they had made the application within a reasonable time.

Finally, we refer to the respondents' contention that since the order had been perfected, it was therefore too late to set aside the default judgment. Counsel pointed out that the land had been transferred to the respondents and registered.

We do not see the merit in the argument for, in our view, this could only apply to the Court below when a party seeks to set aside an order which has been perfected and completed. In that event the Court may be precluded from doing so as the jurisdiction of the Judge over it has come to an end. *(See Re Harrison's Share Under A Settlement* [1954] 2 All ER 453). This Court however is not precluded from exercising its inherent power to set aside a default judgment if it should decide that respondents were disentitled to the order.

For these reasons we would allow the appeal and set aside the order for judgment in default. Further proceedings would follow as if the appellants had appeared to the writ. Costs to the appellants. Deposit to be refunded to the appellants.

Also found at [1985] 1 CLJ 412